Sun Transport, Inc., a wholly owned subsidiary of Marine Investment Corporation, which is in turn a wholly owned subsidiary of Sunoco, formerly known as Sun Company, Inc. *and* Sun Marine Licensed Officers Association. Case 4–CA–26705

September 8, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On October 3, 2000, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

The Respondent excepts to the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by offering less severance pay to the employees represented by the Union than it offered to other employees. The judge found that the Respondent made this offer in response to protected activity, specifically, in retaliation against the Union's past bargaining positions. We find merit to the Respondent's exceptions. Contrary to the judge, we find that the record fails to establish that the Respondent was motivated by antiunion considerations in making its severance offer to employees represented by the Union, and consequently the Respondent's severance offer did not violate the Act as alleged.[2]

I. BACKGROUND

For decades, the Respondent, a subsidiary of Sunoco (formally known as Sun Company, Inc.) operated a marine transportation business that transported petroleum products, primarily for other divisions or subsidiaries of Sunoco. The Union represents approximately 42 licensed officers who worked on the Respondent's barges and tugboats, including chief mates, second mates, chief engineers, and second engineers. As of March 1997,[3] the Respondent employed approximately 87 other seagoing employees who were represented in two separate units by a different union,[4] and approximately 45 individuals not represented by any union.

In March, the Respondent decided to divest itself of its marine transport business and prepared an analysis of the potential severance package liability. For this analysis, the Respondent assumed that all employees, whether represented or unrepresented, would receive the severance package set forth in the Respondent's Involuntary Termination Plan, which it had applied to terminated unrepresented employees since 1992. The Involuntary Termination Plan provided, among other benefits, 2 weeks of severance pay for each year of service up to 20 years, and it required covered individuals to sign a release of all claims against the Respondent. The severance pay was forfeited if employees were offered comparable positions with a successor employer. The analysis anticipated that total severance costs would be about $8.4 million, with approximately $4.8 million allocated to the represented employees.

After completing the above analysis, the Respondent decided to apply the Involuntary Termination Plan to unrepresented employees, as it had in the past. With respect to the represented employees, however, the Respondent decided to offer them only 1 week of severance pay per year of service. Under this plan, the cost of sev-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, the Respondent contends that the judge's rulings, findings, and conclusions demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] In view of our finding that the Respondent did not violate the Act as alleged, we find it unnecessary to pass on the General Counsel and Charging Party exceptions to the judge's remedy.

The Respondent argues in exceptions that the judge should have permitted evidence to support its defense that it bargained in good faith. In view of the result here, we need not reach this issue. There are no allegations that the Respondent failed to bargain in good faith.

[3] All subsequent dates are 1997 unless otherwise indicated.

[4] The Sun Marine Employee's Association (SMEA) represented two units of the Respondent's employees: a unit of unlicensed ship employees and a unit of unlicensed barge employees. SMEA and the Respondent reached agreement on a severance package, which, although initially rejected, eventually was ratified by the members. Like the tentative agreements reached with the Union, the agreements with SMEA contained significantly less severance pay per year of service than the 2 weeks per year granted to the unrepresented employees.

erance benefits for represented employees was reduced from $4.8 to $2 million. The Respondent's negotiators were instructed to stay within the bounds of the $2 million figure in their negotiations with the represented units. They did so.

In 1996, after the Respondent sold a vessel, the Northern Sun, the Respondent offered four laid-off union-represented employees 2 weeks of severance pay per year of service. This was a one-time offer, which was accepted.

In late 1996, prior to the Respondent's preparation of its severance analysis, the parties began bargaining for a successor to the collective-bargaining agreement that expired on November 27, 1996. After the Respondent made the divestiture decision in March, bargaining for a successor agreement continued through the spring, and negotiations also encompassed the issue of severance.[5] In late April or early May, the parties reached a tentative agreement on a successor collective-bargaining agreement and a severance package. The severance package included 1 week's pay per year of service. The membership rejected both of these agreements on May 23.

The parties subsequently returned to the bargaining table, and negotiations were focused almost exclusively on the severance pay issues, as the divestiture was already underway. The Union expressed its concern that the unit employees were not being offered the same severance package offered other employees, and made clear that it would accept the terms of the Involuntary Termination Plan offered to the unrepresented employees. The Respondent rejected that offer.

In September, the parties tentatively agreed to a new severance package that included severance pay of 1 week's pay per year of service.[6] At this point, the divestiture was almost complete and many of the Respondent's employees had been laid off. On October 15, the union membership rejected the new severance package. The Respondent, meanwhile, completed the divestiture in October.[7]

In an October 22 letter, Union President Daniel Milligan asked Vice President Deborah Fretz why the Respondent's best severance offer to unit employees was 50 percent less than the severance paid to all other terminated employees. Thereafter, on October 31, Milligan and the Union's lawyer met with the Respondent's representative to make one last attempt at securing a mutually agreeable severance package. The Respondent's representatives told them that the 1 week per year of severance pay rejected by the membership was the Respondent's last and final offer.

Following the October 31 meeting, and in response to Milligan's October 22 inquiry, Fretz, in a November 17 letter, presented the Respondent's reasons for offering the Union less severance. First, Fretz stated that negotiations differed greatly among employee groups, that the Union incorrectly assumed that the Respondent offered all other employees the same severance package, and that, in fact, the severance packages differed greatly among the represented groups.

Second, Fretz said that the Respondent had considered how responsive the "represented group" had been to the Respondent's efforts to contain costs and improve its competitive position. Fretz noted in particular that in their 1996 contract negotiations, the parties failed to reach agreement on some of the Respondent's proposals, and this resulted in continued high, uncompetitive costs. Fretz stated "[a]ll of this is part of our review and analysis when we determine whether we are willing to offer severance packages to a given group of employees, as well as having some impact on our evaluation of the total additional costs we are willing to sustain."

Third, Fretz expressed her view that the purpose of severance pay is to assist employees while they search for other employment, and added that most employees were not accepting the new owner's job offers.

The Respondent and the Union did not reach further agreement, and the employees represented by the Union ultimately received no severance pay.

Applying a *Wright Line* analysis,[8] the judge found that the Respondent's severance offer was motivated, at least in part, by antiunion animus. Although noting that the Act does not require employers to afford represented and unrepresented employees the same wages and benefits,[9] the judge found that the Respondent's offer was motivated by its desire to retaliate against the Union for engaging in protected activity. The judge further found that the Respondent had not shown that it would have made the same offer even in the absence of protected activity,

[5] Even while the divestiture was imminent, the Respondent continued bargaining for a successor collective-bargaining agreement because it believed securing one would make the company more attractive to potential buyers.

[6] The parties also reached agreement on certain collateral issues.

[7] By the time of the hearing, the Respondent existed only as a shell corporation within Sunoco, with no employees and no business operations.

[8] To prove an 8(a)(3) and (1) discrimination allegation, the General Counsel must show, by a preponderance of evidence, that "antiunion sentiment was a substantial or motivating factor in the challenged employer decision." *Manno Electric,* 321 NLRB 278 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved *in NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). Once the General Counsel makes this showing, the burden shifts to the respondent to show it would have taken the same actions even in the absence of protected activity. Id.

[9] *Shell Oil Co.,* 77 NLRB 1306, 1310 (1948).

and therefore the Respondent's severance offer to employees represented by the Union violated Section 8(a)(3) of the Act.

Specifically, the judge found Fretz' November 17 letter to be an admission that the Respondent retaliated against the Union for bargaining positions taken in the past. The judge noted that Fretz stated in the letter that the Respondent had considered the Union's past bargaining positions, and attributed its uncompetitive situation to these bargaining positions. Because Fretz did not specify the particular bargaining positions or the uncompetitive costs involved, the judge found that the Respondent's real reason for its severance offer was a desire to retaliate against the Union for engaging in protected activity. Fretz' last point, that employees did not accept the successor's job offers, was, in effect, "blam[ing] the Union for something over which it had no[] control," was "at best irrelevant, and, at worst, a confirmation of the union animus."

The judge implied that the Respondent's severance offer was a departure from its standard practice, and that this departure was further evidence of antiunion animus. He noted that in 1996, before negotiations began, the Respondent sold a ship and gave 2 weeks of severance pay per year of service to the four laid-off, union-represented employees. In addition, because the Respondent initially considered offering 2 weeks of severance pay per year of service to all employees, the judge interpreted the Respondent's decision to offer only 1 week of severance pay as a "cut" solely imposed on represented employees. The judge found that there was a substantial disparity between the separate offers, and this disparity showed that the Respondent treated the Union differently because the unit employees exercised their right to bargain collectively.

Finally, the judge found that the Respondent's discriminatory motive was ultimately confirmed by the fact that the employees represented by the Union never received any severance.

Having found that the Respondent's offer was motivated in part by antiunion animus, the judge also found unpersuasive the Respondent's defense, i.e., that its decision to offer lower severance was driven by economic considerations. The judge found the testimony of President James Fidler, the chief decision maker, to be vague and unspecific regarding the Respondent's cost structure and regarding the cost concessions that the Union refused to make.

II. ANALYSIS

Contrary to the judge, we find that the General Counsel has failed to show that the Respondent was motivated by antiunion animus when it offered lower severance pay to employees represented by the Union than that offered to unrepresented employees.[10] As the judge correctly noted, the Board has long held that employers may offer different benefits to represented and unrepresented groups of employees as part of its bargaining strategy. *Shell Oil*, supra. Thus, the mere fact that different offers are made or that different benefits are provided does not, standing alone, demonstrate unlawful motive. Although an employer is not free to discriminatorily afford represented employees less benefits than unrepresented employees, i.e., in order to discourage support for the union, the record does not establish that the Respondent engaged in such conduct here.[11]

We find that Fretz' November 17 letter to the Union does not demonstrate antiunion animus. In the letter, the Respondent expressed its belief that the Union's bargaining positions had led to high costs of operations and that those high costs, in turn, were a factor considered by the Respondent in formulating its severance proposal. Thus, we cannot say that the bargaining position was itself the basis for the severance pay offer.

Further, even if the severance pay offer was based upon the Union's bargaining position during the negotiations for a successor contract, we would still find no violation of the Act. With respect to this Union, the matter of severance pay arose during comprehensive bargaining for a new contract. The Respondent sought concessions in late 1996 and continued to seek them in 1997. And, in 1997, this bargaining was intertwined with the bargaining over severance pay. The Respondent sought to use the severance pay issue to force concessions in other areas. More particularly, the Respondent, as it explained in the November 17 Fretz letter, was tying its position on severance to the Union's refusal "during the entire period" (i.e., during the negotiations in 1996 and 1997 for a successor collective-bargaining agreement) to make concessions in other areas.

There is no evidence, or even an allegation, that the Respondent's bargaining was in bad faith. Indeed, all of this was a legitimate part of the bargaining process. As the Board and the courts have recognized, "[c]ollective bargaining by its very nature is an 'annealing process hammered out under the most severe and competing forces and counteracting pressures.'" *Chevron Oil Co. v. NLRB*, 442 F.2d 1067, 1074 (5th Cir. 1971) (quoting *NLRB v. Dalton Brick & Tile Corp.*, 301 F.2d 886, 895 (5th Cir. 1962)). The Respondent's severance offer was

[10] Because we find that the General Counsel has failed to carry his initial burden of proof under *Wright Line*, supra, we need not address the judge's analysis of the sufficiency of the Respondent's evidence concerning its economic costs.

[11] *Empire Pacific Industries*, 257 NLRB 1425, 1426 (1981).

but one element of the "competing forces and counteracting pressures" inherent in the collective-bargaining process. Consequently, the Respondent's consideration of the Union's bargaining positions does not demonstrate antiunion animus.[12]

We recognize that the Respondent ultimately made no severance payment to these employees. However, there is no allegation that the Respondent violated Section 8(a)(5) by taking action that was different from its bargaining position. Further, as with the severance offer, the ultimate lack of a severance payment demonstrates nothing more than the Respondent's attempt to offset the lack of savings in other areas. Thus, just as the Respondent could offer reduced severance pay as a means of inducing concessions, so the Respondent could withhold any severance pay to achieve cost-savings.

Finally, the judge found that Fretz blamed the Union for something over which it had no control. The judge suggested that Fretz' statement in the November 17 letter that many employees did not accept job offers with the successor employer was confirmation of the Respondent's antiunion animus. We disagree. Fretz was merely explaining the Respondent's attempts to secure post-divestiture employment for members of the unit. Rather than blaming the Union, Fretz was simply reciting a fact and reiterating the Respondent's efforts on behalf of the represented employees. Accordingly, we find no animus in Fretz' statement.

For the foregoing reasons, we find the General Counsel failed to establish that the Respondent was motivated by antiunion animus in offering less severance pay to employees represented by the Union than to unrepresented employees. Accordingly, we find that the Respondent did not violate Section 8(a)(3) of the Act as alleged.

ORDER

The complaint is dismissed.

[12] In agreeing with his colleagues that the General Counsel has failed to demonstrate that the Respondent was motivated by antiunion animus when it offered lower severance pay to employees represented by the Union than that offered to unrepresented employees, Member Walsh observes that there is no evidence that the Respondent's offer to the Union was intended as punishment for bargaining positions that the Union took during negotiations that led to earlier collective-bargaining agreements. Rather, the Respondent's offer was made in an effort to induce concessions as part of the give-and-take during negotiations over a comprehensive successor agreement.

Dated, Washington, D.C. September 8, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Donna D. Brown, Esq., for the General Counsel.
Anthony B. Haller, Esq., of Philadelphia, Pennsylvania, for the Respondent.
Harold M. Weiner, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on January 20 and 21 and June 15, 2000. The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act by offering employees represented by the Charging Party Union (the Union or SMLOA) lesser severance benefits than those offered to unrepresented employees for discriminatory reasons. Respondent filed an answer denying the essential allegations in the complaint. After the trial closed, the parties filed briefs, which I have read and considered.

Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Pennsylvania corporation, was engaged in the business of transporting petroleum products until late October 1997. During a representative 1-year period, it purchased and received goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Accordingly, I find that, at all material times, the Respondent was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, the Union (SMLOA) was a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

In January 1996, Respondent operated a fleet of two ships and nine tug and barge units as part of its marine transportation business. Some 42 licensed officers on the barges and tugboats—chief mates, second mates, chief engineers, and second engineers—were represented by the Union. Other seagoing employees were represented in two separate units—one for unlicensed ship employees and one for the unlicensed barge employees—by another union, the Sun Marine Employees' Association (SMEA). In March 1997, Respondent employed about 87 of these other seagoing unlicensed represented employees.

In January 1996, the Respondent also employed some 56 individuals who were not represented by any union. In the unrepresented group were some 42 seagoing personnel, including motor barge and tugboat masters, ship captains, and licensed ship officers. Also in the unrepresented group, as of March 1997, were 14 administrative personnel, all of whom worked at Respondent's Philadelphia facility, except for one who worked in San Juan, Puerto Rico. By March 1997, the total number of unrepresented individuals employed by Respondent had dwindled to 45.

The Respondent and the Union were parties to a series of collective-bargaining agreements, the most recent of which was effective from May 1, 1994, to November 27, 1996. That agreement had no general severance pay provisions, although it contained a "special severance" clause that applied in the case of a hostile takeover.

In early 1996, Respondent decided to sell one of its vessels, the Northern Sun, resulting in the layoff of four employees represented by the Union. On April 30, 1996, Respondent and the Union entered into an agreement that provided severance pay for the laid-off employees. Among the provisions in this agreement was a severance package of 2 weeks' pay for every year of service, with a minimum of 12 weeks for 6 years or less of service, together with continuing medical benefits. In return, employees relinquished recall rights and agreed to sign a general release of all other claims against Respondent. After the layoff, there remained some 38 employees in the unit represented by the Union.

After the sale of the Northern Sun, the Respondent made some management decisions that led to the divestiture and sale of its marine operation and the layoff of its entire work force. Beginning in October 1996 and continuing through the completion of the divestiture about 1 year later, the Respondent and the Union engaged in bargaining, first, for a new collective-bargaining agreement, and, finally, for severance pay for the employees who were going to be laid off because of the divestiture. The aftermath of those negotiations and the divestiture itself resulted in this litigation.

2. Respondent's road to divestiture and initial bargaining negotiations

Respondent had an insular position in its parent's corporate organization. Except for a "very small percentage," most of Respondent's customers were internal, that is, other divisions or entities of the parent corporation. Although the Respondent utilized a "pro forma" profit-and-loss statement, the revenue side of that statement was not composed of "rigorously" negotiated money. Thus, the Respondent's primary focus was on the cost side of the statement.[1]

As a result of studies between 1995 and 1997, Respondent and its parent decided both to reduce costs and to question seriously whether it wished to remain in the marine transport business. One of the operative considerations was passage of the Oil Pollution Act of 1990, legislation enacted after the Exxon Valdiz oil spill in Alaska. That legislation heightened the potential liability for an oil spill from one of Respondent's vessels.

In an effort to improve its competitive position by cutting costs, Respondent unilaterally reduced the 1997 vacation pay for its unrepresented captains at the end of 1996 and basically froze the 1997 merit wage program for its unrepresented employees. Respondent also attempted to reduce labor costs in its represented units through collective bargaining, but it was unable to achieve all the cost savings it wanted in union negotiations.

Negotiations between Respondent and the Union began in October 1996 for a successor agreement to the one that was to expire at the end of November 1996. The parties agreed to extend the terms of the expired agreement while negotiations progressed on the new agreement, except for the provisions on vacation pay. Negotiations for a new agreement proved unsuccessful. Sticking points, according to the Union, were Respondent's effort to do away with vacation pay, to alter disability pay, and to dispense with pay raises.

In January 1997, some high-ranking officials made a recommendation that the parent company divest its marine operations and basically sell the assets of the Respondent. The final decision to divest was made in mid-March 1997. Bid proposals were sent out, with a preference for buyers who would continue to employ the existing work force. In the spring of 1997, a tentative deal with a particular buyer fell through because the buyer's stockholders rejected it. In July, another buyer, the Maritrans Corporation, made an unsolicited offer to buy the Respondent's marine transportation assets and the offer was accepted.[2]

After the sale, the divestiture took place, with layoffs occurring incrementally through the end of October 1997, at which time Respondent no longer had any employees. Respondent apparently still exists as a corporate entity, but does not engage in any business activities.

3. The severance package study

In early March 1997, the Respondent undertook a study of the potential severance package liability it would incur as a result of the anticipated divestiture. Those costs, as well as others connected with the sale of the marine business, such as legal and brokers' fees and other expenses in cleaning and "turning over the equipment," had to be deducted from the sales price to determine what, if anything, Respondent would gain from the sale. In the end, according to the Respondent's presi-

[1] The above and most of the factual statement dealing with Respondent's financial situation and strategy is based on the testimony of Respondent's president and general manager, James Fidler.

[2] The contract of sale between Respondent and Maritrans was not offered in evidence.

dent and general manager, James Fidler, the parent corporation netted some $4 to 5 million from the sale, although no supporting documentary evidence was submitted on this point.

The Respondent's study of its severance package obligations—titled "1997 Projected Severance Package Exposure"—assumed that all of its employees, both the represented and unrepresented work force, would obtain the same severance benefits that were set forth in Respondent's Involuntary Severance Plan for unrepresented employees and individuals. That plan, unilaterally promulgated by Respondent in 1992, and revised in February 1997, provided that covered individuals would basically be entitled to so-called enhanced severance benefits of 2 weeks' pay for each year of service up to 20 years, plus continued medical and other benefits. Under the unrepresented employee severance plan, the individual who received those benefits would be required to sign a general release of all claims against Respondent and would be disqualified from receiving any severance pay if he or she were offered a comparable position with the successor employer. It was, of course, anticipated that severance packages for the represented employees would be the subject of collective bargaining.

The severance package study assumed a total liability of about $8.4 million.[3] It also assumed 45 unrepresented employees and 125 represented employees. Estimated severance pay—basically 2 weeks for each year of service for all employees—amounted to about $5 million, about $2.2 million for unrepresented employees, and about $2.8 million for represented employees. Another $3.4 million was anticipated in medical benefits, about $1.4 million for unrepresented employees, and about $2 million for represented employees. The breakdown as between represented and unrepresented personnel for the $8.4 million of total projected expense was about $3.6 million for the 45 unrepresented personnel and about $4.8 million for the 125 represented employees.

According to President Fidler, Respondent decided that the $8.4-million-figure was too high. It decided to slice the projected severance package for represented employees, basically, by reducing it from 2 weeks to 1 week per year of service. The cuts were reflected in a document, dated April 2, 1997, that set forth some $2 million of total severance benefits available for the represented employees. This was a reduction of over 50 percent from the earlier projected amount for represented employees. Respondent's negotiators were given instructions to stay within that figure in bargaining with the unions bargaining on behalf of the three represented units, and they did.

No cuts were made to the projected severance package for unrepresented personnel. Since the 2-week severance package for unrepresented employees was unilaterally determined, the projected amount for unrepresented employees was the actual amount offered and distributed to them. Although the amount of the severance package for the represented employees was the subject of negotiations, Respondent never offered the Union severance pay of any more than 1 week per year of service.

4. Continuing negotiations and the first unratified agreement

In mid-March 1997, the Union was notified that Respondent was planning to dispose of its entire fleet. Thereafter, the negotiations were expanded to include effects bargaining related to the divestiture of the marine transportation business. In that connection, the Union asked for and received from Respondent a copy of its severance plan for unrepresented employees, discussed above.[4]

Bargaining continued until late April or early May 1997, at which time the parties reached an overall agreement on both a collective-bargaining agreement and on a severance package. The latter was basically 1 week of severance pay per year of service, plus medical benefits. In an effort to secure membership ratification of the overall agreement, the Respondent agreed to withdraw its proposal to do away with vacation pay. The employees would thus obtain their 1997 vacation pay, which was eventually paid out to union members.

The above agreement was in line with Respondent's April 2, 1997 severance package decisions. Frank Baumann, Respondent's chief negotiator, testified that he thought he could convince the Union to settle for severance pay of 1 week per year of service, plus the vacation pay that previously had been withheld. A contemporaneous worksheet, which was received in evidence as Respondent's Exhibit 36, showed that this offer amounted to about $673,000, $540,000 for severance pay and $133,000 for the 1997 vacation pay. (See R. Br. 19.)

On May 9, 1997, the Union sent a letter to its members in connection with a membership ratification vote on the agreement. The letter expressed concern about the severance package, but said that it was about the best that could be obtained in the circumstances. The employees nevertheless voted to reject the agreement on May 23, 1997. After this initial failure of the membership to ratify the agreement, the parties returned to the bargaining table.

5. Further negotiations and the second unratified agreement

Subsequent negotiations concentrated on a severance package. It became obvious, particularly after the agreement for the sale of Respondent's marine transportation assets to the Maritrans Corporation, that Respondent was going out of the marine transportation business and there would be no need for a new collective-bargaining agreement. Indeed, through the summer of 1997 and into early fall, Respondent was laying off employees in anticipation of going out of business entirely.

The Union continued to express its concern that the severance package it was being offered was less than that offered to the unrepresented employees. As early as April 1997, Union President Daniel Milligan wrote Sunoco Chairman and CEO Robert Campbell, complaining that Respondent was not offering the more generous package to the Union. Deborah Fretz,

[3] The study apparently did not assume the sale of one of Respondent's ships, the Philadelphia Sun. If the employees associated with that ship were also entitled to severance pay, the amount would be even higher, although the record does not permit even an estimate of the additional amount of severance liability in that event.

[4] There appear to have been some initial discussions about severance pay in February 1997 because the Union was notified that Respondent intended to sell two of its vessels.

the Sunoco senior vice president with overall responsibility for Respondent, replied for Campbell, stating simply that severance pay was the subject of negotiations. On July 2, 1997, a union lawyer, on behalf of all the unions that were then negotiating over severance pay, wrote Respondent protesting that the unrepresented employees were getting more in severance pay than the represented employees. In that letter, the lawyer said that the unions would "accept the terms and conditions" of the Involuntary Severance Plan applicable to the unrepresented employees. The Respondent had not offered those terms and conditions to any of the unions, and, in a response dated July 22, 1997, the Respondent rejected the union lawyer's position.

Eventually, the parties agreed to an essentially stand-alone severance package, which basically amounted to the 1-week-per year of service package previously offered by Respondent. The package included provisions dealing with a general release and forfeiture of severance pay for employees who were offered a comparable position with the new owner. Although there was no condition that a collective-bargaining agreement be part of the package, the parties also resolved some minor miscellaneous issues. The most significant of those was an increase by the Respondent from $1400 to $3000 for resolution of the so-called Bombster grievance, which dealt with the alleged use of nonunit employees to perform unit work after the sale of the Northern Sun.

Another ratification vote was scheduled with a deadline for acceptance by September 12, 1997, a date later extended to sometime in October. On October 15, 1997, the severance package was rejected by the union membership.[5]

6. Subsequent efforts to resolve the dispute

On October 22, 1997, Union President Daniel Milligan wrote Sunoco Vice President Deborah Fretz about the severance pay issue. Milligan referred to Fretz' April 11, 1997 letter stating that severance pay was the subject of negotiations. Milligan stated that, since negotiations had now concluded with the membership's rejection of Respondent's severance offer, Fretz was "now free to answer the question" he had posed to CEO Campbell in April: "Why is it that the Company's best severance offer was 50% less than all other employees who have been terminated from Sun?"

On October 31, Milligan and the Union's new lawyer met with management representatives in a final effort to secure a mutually agreeable severance package. At that meeting, which lasted about an hour, the Union pleaded for 2 weeks of severance pay. Human Resources Manager LaVonne Pelisari, on behalf of Respondent, told the union representatives that the Respondent's 1-week severance offer, which had been rejected by the Union's membership, was Respondent's last and final offer. By this point, Respondent had terminated all of its employees and was effectively out of the marine transportation business, a fact mentioned at the meeting by Pelisari.

[5] At about this time, the Respondent and SMEA reached agreements, which were eventually ratified. Those agreements included severance packages for the two units represented by SMEA. The employees in the ship unit initially failed to ratify their agreement on September 26, 1997, but did so about a month later.

In a November 17, 1997 reply to Union President Milligan's October 22 letter, Sunoco Vice President Fretz noted that she had waited to respond until after the October 31 meeting. She gave three reasons for why the Respondent's severance offer was less than that for other employees. First, she said that Milligan was wrong in assuming "that all other employees have been offered the same severance packages. Negotiations and severance packages differ greatly between represented groups." Secondly, she stated that Respondent considered "how responsive" the "represented group has been to our requests for consideration of ideas and cost containments that would improve our competitive position." Fretz continued:

> In the case of the most recent negotiations with [SMLOA], in 1996 the Company presented requests for improvements in our cost structure as defined by our labor agreement. Unfortunately, we were unable to reach agreement. Consequently, during the entire period we negotiated with SMLOA, the Company continued to experience what we believe are high, uncompetitive costs. All of that is part of our review and analysis when we determine whether we are willing to offer severance packages to a given group of employees, as well as having some impact on our evaluation of the total additional costs we are willing to sustain.

The last point Fretz made in her letter dealt with Respondent's asserted concern that as many employees as possible continue employment with the new owner. She stated that "[s]everance packages are designed to assist employees while they search for other employment; in this case, most of the employees were not receptive to the new owner's job offers."[6]

The original charge in this case was filed in December 1997. Respondent apparently had no further contact with the Union until late in the following year. According to Human Resources Manager Pelisari, Union President Milligan told her, in a telephone conference call on November 8, 1998, that if Respondent's offer of the year before were still on the table "it would really fly." Respondent rejected the overture, and, certainly by that point, Respondent had removed its previous offer from consideration. Nor has Respondent made any severance payments to the employees represented by the Union. The parties were, however, able to definitively resolve the Bombster grievance in December 1998.[7]

[6] Fretz testified about the letter, but her testimony did not offer any useful clarification of the language used in the letter.

[7] The Union and the General Counsel also rely on the testimony of employee Ann Sill in an attempt to show that Respondent harbored some animus specifically against Union President Dan Milligan. That testimony is based on conversations Sill had with management officials, particularly Human Resources Manager LaVonne Pelisari, who credibly denied making the remarks attributed to her. Sill's testimony, even if I were to credit it, does not provide the type of animus that would be useful in this case. It appears to focus on alleged personal animus rather than union animus. In any event, I do not credit any of Sill's testimony. Sills displayed an animus of her own against Respondent. Moreover, her testimony was, on the whole, vague, implausible, and lacking in clarity or context. I cannot rely on any of it in making findings of fact in this case.

B. Discussion and Analysis

Absent an unlawful motive, an employer is not obligated to offer union-represented employees the same benefits available to unrepresented employees. *Shell Oil Co.*, 77 NLRB 1306, 1310 (1948). See also *Phelps Dodge Mining Co.*, 308 NLRB 985, 995–998 (1992), enf. denied 22 F.3d 1493 (10th Cir. 1994); *Empire Pacific Industries*, 257 NLRB 1425, 1426 (1981); *B.F. Goodrich Co.,* 195 NLRB 914 (1972). Conversely, the above line of cases makes clear that offering or providing different benefits may be violative of Section 8(a)(3) and (1) of the Act, if such conduct is motivated by antiunion considerations.[8]

The question in this case is whether the General Counsel has proved by a preponderance of the evidence that Respondent was motivated by antiunion reasons when it admittedly failed to offer the employees represented by the Union the same severance package it offered to the unrepresented employees. Respondent contends that it was motivated only by legitimate business reasons. I agree with the General Counsel.

The General Counsel points to Vice President Fretz' November 17 letter as evidence that Respondent sought to punish the Union for having taken bargaining positions in past negotiations that Respondent did not like. The letter was sent after the employees had rejected the Respondent's September 1997 stand-alone severance package and contract negotiations had ended. At that point, Respondent's vessels had been sold and most of the employees had been laid off. There was no need for an overall collective-bargaining agreement and thus little or nothing in the way of tradeoffs for either side.

On its face, the second point in Fretz' letter—actually, the main point—makes it clear that Respondent did not offer the Union the same severance benefits it gave to the unrepresented employees because of the Union's past bargaining positions. Initially, Fretz stated that, in deciding on a severance package for a represented group of employees, Respondent considered "how responsive" the group had been to Respondent's requests for cost containments to improve its competitive position. Fretz specifically referred to the 1996 bargaining negotiations for a new collective-bargaining agreement. She clearly attributed the Respondent's alleged high costs to the Union's bargaining positions in those negotiations. But she did not specify either the costs or the Union's bargaining positions to which she referred. And since Fretz was answering Milligan's blunt question why Respondent did not offer the Union the severance benefits given to unrepresented employees, the causal link is inescapable. Thus, I read the letter as acknowledging a retaliatory purpose for Respondent's failure to offer the Union the same severance benefits it gave the unrepresented employees.[9]

The other two points made by Fretz in her letter are somewhat ambiguous, but they do not rebut the main point discussed above. Fretz' first point, that negotiated severance packages differ greatly between "represented groups," is merely a truism; it is not responsive to the thrust of Milligan's question, which dealt with the severance benefits paid to the unrepresented employees. Fretz' last point was that severance packages were designed to assist employees in their search for other employment and that the Union's members were not receptive to job offers from the new owner. Although this point does not appear to have any relationship to Fretz' main point, it nevertheless seems to blame the Union for something over which it had no control. Respondent had offered severance pay to all of its employees, albeit in different amounts, without regard to entitlement or whether they searched for other employment. Moreover, severance pay would be forfeited only if employees received comparable offers from the new owner. Significantly, the employees represented by the Union received no severance pay and thus had none to forfeit. In these circumstances, Fretz' last point is, from Respondent's standpoint, at best, irrelevant, and, at worst, a confirmation of the union animus reflected in her main point.

My reading of the Fretz letter gains support from other evidence indicating that, before the Union's alleged uncooperative bargaining position mentioned in the letter, the Respondent granted employees represented by the Union essentially the same 2-week per year of service severance package set forth in the Involuntary Severance Plan. In the spring of 1996, before bargaining was initiated on a new contract, Respondent and the Union agreed on such a package for the four employees laid off as a result of the sale of the Northern Sun. I recognize that far fewer employees were given that severance package and thus the overall cost to the Respondent was considerably less than a similar package for the remaining unit employees. But admittedly the Respondent was also concerned about costs at the time of the Northern Sun agreement.

In its brief (Br. 41–42), Respondent contends that Fretz' letter meant to refer to "higher costs," which had not been addressed in the "same course of bargaining" with the Union. But both the language used in Fretz' letter and the context of the letter show that Respondent blamed the Union for its past course of bargaining. Fretz specifically referred to the 1996 bargaining. Moreover, before the September 1997 severance offer, both parties had dropped any effort to conclude an overall new bargaining agreement. Thus, it was past bargaining and not present bargaining that was the focus of the letter. Nor does Respondent specify in its brief, any more than Fretz does in her letter, the higher costs Respondent allegedly experienced because of the Union's bargaining positions or why those costs warranted withholding from the Union the more generous severance package given to the unrepresented employees. Indeed, Respondent seems to assert that these alleged higher costs were first considered in its April 1997 determination to allocate sev-

[8] Respondent does not dispute the applicability of the principle set forth in the above line of cases. Indeed, it cites three Board cases (*Sundstrand Castings Co*., 209 NLRB 414, 427 (1974) (Br. 37); *Winn-Dixie Raleigh, Inc*., 267 NLRB 231, 235, 236 (1983) (Br. 35); and *Sun Oil Co*., 245 NLRB 59 (1979) (Br. 36)), which recognize the principle but find, in the circumstances of each case, business rather than antiunion reasons motivated the employers' actions.

[9] Contrary to the Respondent's contention (Br. 42), reliance on the Fretz letter is not prohibited by Sec. 8(c) of the Act. The letter was more than an opinion. It was Respondent's effort to explain conduct that is alleged to be discriminatory. Moreover, the letter does not stand alone; other evidence also supports the finding of discrimination. See *D & E Electric*, 331 NLRB 1037 fn. 1 (2000).

erance pay differently as between the represented and unrepresented employees, an issue with which I deal below.

My reading of the Fretz letter is also supported by evidence, submitted by Respondent, showing that the Respondent initially considered paying all the employees—represented and unrepresented alike—the full 2 weeks per year of service set forth in the unrepresented employees' severance plan. That proposal was dropped in early April 1997 because it was thought to be too expensive, surely a legitimate business judgment. What Respondent did, however, was to cut the severance amount available to the represented employees by over 50 percent. No cut at all was made to the amount allocated to unrepresented employees. The differences are so substantial that Respondent's cuts lend credence to the view that Fretz' letter was simply a continuation of a fixed determination to treat the represented employees differently from the unrepresented employees because they exercised their right to bargain collectively.[10]

In its brief, Respondent seems to contend that its different treatment of represented employees does not reflect a retaliatory motive, but rather a desire to effect a kind of rough justice based on past cost concessions made by unrepresented employees that were not matched by represented employees. As I have indicated, I do not read the Fretz letter that way. To the extent, however, that Respondent's contention is also meant to explain away its initial decision, made in April 1997, to treat the two groups differently, that contention must be based on specific evidence concerning that decision at the time it was made. The only testimony on the point came from President James Fidler, who was, he testified, the primary decision maker for setting final severance pay allocations. Any recommendations he may have made to Fretz, his superior, were followed. But Fidler's testimony concerning why he decided to authorize severance amounts allocated to the represented employees that were more than 50 percent lower than those allocated to unrepresented employees is ambiguous, unspecific, and unpersuasive.

Fidler first surmised that the represented employees would more easily secure employment from the new owner. It is not apparent how this point deals with costs. Moreover, it is hard to evaluate the testimony since there was no reliable evidence as to which employees actually did obtain such employment or whether such employment was comparable to their former employment. In any event, however, it would seem that this factor would cut the other way. If more represented employees obtained comparable offers from the new employer, they would not be entitled to severance pay and Respondent would be spending less on severance pay for the represented employees as a group. All of Respondent's severance pay proposals, whether they applied to represented employees or unrepresented employees, provided for forfeiture if offers of comparable employment were made to the employees by the new owner. This was not therefore an appropriate basis to distinguish between represented and unrepresented employees. Fidler also referred to a need for a so-called "smooth and orderly transition" to the new owner. That reference, however, is not only ambiguous, because it does not appear to deal with costs, but irrelevant. To the extent that it was meant to suggest that employees represented by the Union were somehow interfering with operations prior to the sale, there was no evidence of that in April 1997. In any event, both Fretz and another witness for Respondent testified that the alleged interference had nothing to do with severance pay issues.

Fidler also testified that Respondent hoped to achieve cost savings in bargaining with its unions. At the time, in early April 1997, Respondent understandably still wanted to negotiate agreements that would facilitate the sale of its marine operations. But Fidler's testimony is not specific enough to show that the substantial difference between the severance allocated for represented employees and that allocated for unrepresented employees was rationally based on a need to recoup cost concessions attained in the unrepresented units but not in the represented units. Elsewhere in his testimony, Fidler referred to the 1997 vacation pay concessions made by the unrepresented captains, but not, apparently, by other unrepresented employees. Fidler gave no dollar figures on those vacation pay concessions, although a document received in evidence contains an assertion that this could amount to some $225,000. Fidler also referred to frozen merit increases for unnamed unrepresented employees. But no dollar figures were given for that item either.

Fidler's testimony about the cost savings he hoped to achieve in the represented units is likewise not specific enough to make comparisons. He testified, for example, that Respondent hoped to obtain, in negotiations with the Union, between 50 and 100-some thousand dollars in "expense reduction savings." He hoped to achieve similar savings from the other union with which Respondent bargained. But there is no further specificity in the alleged "expense reduction savings," and no indication that any of those savings were equivalent to the merit pay concession obtained in the unrepresented unit. Although Fidler also referred to vacation pay savings—at one point overestimating the amount attributable to the Union's bargaining position—that item was not a significant factor in the Respondent's overall analysis. Respondent's chief negotiator, Bauman, estimated that the 1-week severance package, augmented by vacation pay, amounted to 1.2 or 1.3 weeks of severance for the employees represented by the Union. Moreover, at the time Fidler was making his allocation decision, in April 1997, the Respondent was rejecting the Union's effort to obtain vacation pay. Only later did Respondent agree to give vacation pay to the employees represented by the Union, in an attempt to obtain ratification of the first agreement. In any event, the vacation pay eventually paid out to those employees was only a small portion of the substantial difference in allocations between

[10] Contrary to the suggestion in Respondent's brief (Br. 47), reliance on the April 1997 evidence does not run afoul of the 6-month 10(b) statute of limitations. Indeed, the Respondent seems to rely on some of this evidence in support of its own positions. The violation alleged here occurred in September 1997, well within the 10(b) period. The evidence discussed above, submitted by Respondent, is simply background evidence useful in explaining both Respondent's September 1997 offer and Vice President Fretz' letter of November 17, 1997, stating the basis for that offer. Reliance on background evidence is clearly permissible to shed light on events within the 10(b) limitations period. See *Monongahela Power Co.,* 324 NLRB 214 (1997).

represented and unrepresented employees. It alone could not have explained that difference.[11]

Finally, what ultimately confirms a discriminatory motive on this record is that Respondent never even made the severance payments to the employees represented by the Union that it had offered in bargaining. Fidler testified that he knew of no other instance, in his 31 years of experience with Respondent, in which no severance payments had been made to a group of involuntarily terminated employees. There was no cost issue preventing such payments; indeed, they had already been budgeted and Fidler admitted that the payments could have been made. Obviously, the Union was not in a strong bargaining position after receipt of the September 1997 offer because the Respondent was essentially out of business. But the Respondent at some point removed even the 1-week severance offer from the table, although it was told in the fall of 1998 that the offer might then be acceptable. Ordinarily, an employer is entitled to implement its last best offer when the parties have reached a legitimate impasse. Respondent's failure to do so and make any severance payments in this case is telling. It confirms that union animus and not recouping costs was the motivation for its treating employees represented by the Union differently from unrepresented employees.

In these circumstances, I find that the General Counsel has proved that a reason for Respondent's failure to offer the employees represented by the Union the same severance benefits offered and paid to unrepresented employees was its desire to retaliate against those employees because of the past bargaining positions taken by their bargaining agent. The Respondent has not proved that it would have acted in the same way absent its motive to retaliate against the Union.[12]

Respondent spends much of its brief arguing that unlawful intent cannot be inferred from an employer's economic bargaining position. But that is not this case. I have found evidence of discriminatory motive that explains Respondent's failure to make the same severance offer that it made to unrepresented employees. That evidence is independent of the Respondent's bargaining position itself. Indeed, it was Vice President Fretz' letter, which unlawfully focused on the *Union's* bargaining position, that spawned the complaint in this case. *American Ship Building Co. v. NLRB,* 380 U.S. 300 (1965), cited by Respondent (Br. 34), is not to the contrary; rather it supports my analysis. In that case, the Supreme Court held that an employer's decision to lock out employees for bargaining positions taken by their bargaining agent was not unlawful "absent some unlawful intention." Id. at 312–313. That unlawful intention is present here.

Contrary to Respondent's contention, it is not significant that the General Counsel has not alleged, and indeed dismissed a charge alleging, that Respondent failed to bargain in good faith. I have made no finding as to whether or not Respondent bargained in good faith. Nor can I agree with the position taken in Respondent's brief that I must presume that Respondent did bargain in good faith. As the issue is not before me, I make no presumption as to good-faith bargaining, one way or the other. Likewise irrelevant is Respondent's discussion in its brief of what kinds of bargaining positions an employer can and cannot take without violating Section 8(a)(5) and (1) of the Act. The Board is not permitted to deal with allegations that were neither alleged nor litigated. See *Radio Officers v. NLRB*, 347 U.S. 17, 53–54 (1954); and *Griffin Pipe Division,* 136 NLRB 1669, 1674 fn. 10 (1962), enfd. 320 F.2d 656, 658–659 (7th Cir. 1963).

I recognize that Respondent's basic contention is that it bargained over severance pay and reached agreement with Union negotiators on the matter twice, only to have the bargain rejected by the employees. But that contention, although superficially appealing, is unavailing. The Union negotiators' unratified agreement to accept the less generous package does not preclude a finding of discrimination in the failure to offer the more generous package. The Union negotiators cannot be faulted for recommending acceptance of the best they could get in the face of discrimination that could not be remedied until the matter was litigated. There is no waiver of rights in such circumstances. See *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 237 and fn. 14 (1963); and 328 F.2d 723, 726–727 (3d Cir. 1964) (decision on remand).

CONCLUSION OF LAW

By discriminatorily failing to offer the same severance benefits to employees represented by the Union as were offered and paid to unrepresented employees, Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in an unfair labor practice in violation of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. Because Respondent has basically gone out of the marine transportation business and has no employees, the notice that would normally be posted is to be mailed to the homes of the affected employees. See *Jefferson Smurfit Corp*., 325 NLRB 280 fn. 2, 301–302 (1998).

Consistent with the violation found, I conclude that, absent unlawful discrimination, Respondent would have offered the employees represented by the Union the 2 weeks per year of service offered and paid to unrepresented employees rather than the 1-week per year package it actually offered. The General

[11] Other parts of Fidler's testimony are difficult to assess and of little use in analyzing this issue. His reference to represented units being uncompetitive has no meaning independent of cost-savings considerations, which are discussed above. Fidler also testified that the other union, SMEA, had been more responsive to cost-savings, on the vacation pay issue, for example, than SMLOA. But that testimony is irrelevant to the issue of why the severance amounts allocated for the represented employees were so much less than those for the unrepresented employees. Finally, Fidler's testimony concerning the amount Respondent would gain from the sale of its marine assets does not explain the difference in treatment between the represented and unrepresented employees. Even though Fidler testified that, in April 1997, he thought the Respondent would break even on the sale, he also testified that the Respondent eventually netted between $ 4 and 5 million.

[12] See *Wright Line*, 250 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 482 U.S. 393 (1983).

Counsel asks that Respondent be ordered to pay the employees represented by the Union the same 2-week package given to the unrepresented employees. There is a problem with that remedy, however, in the circumstances of this case. Although the September 1997 offer was discriminatory, it was made in the context of bargaining negotiations that cannot be reconstructed at this time, 3 years after the Respondent has effectively gone out of business. More importantly, since the 2-week severance package was never offered to the Union in negotiations, the General Counsel's proposed remedy seems to run afoul of *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). In that case, the Board found that an employer unlawfully refused to agree to a contract proposal that it check off union dues because it did not want "to aid and comfort the union." The Supreme Court did not disturb the unfair labor practice finding, which was enforced by the court of appeals, but it made clear that the Board does not have the remedial authority to compel an employer to implement a contractual provision that was never offered to a union in bargaining. Id. at 102. Although *H.K. Porter* involved only Section 8(a)(5) of the Act, the Court's discussion of remedy applies, in my opinion, to the 8(a)(3) violation in this case, particularly, where, as here, the gravamen of the violation is a discriminatory failure to make a particular offer. Compare *Darling & Co.*, 170 NLRB 1068, 1071–1073 (1968), enfd. 420 F.2d 63 (7th Cir. 1970) (failure to *grant* benefits).

There is, however, no impediment to ordering Respondent to pay the 1-week severance package that it did offer to the Union and which it has not, to date, paid. Accordingly, I shall recommend that the Respondent be ordered to pay the employees represented by the Union the 1-week per year of service severance package it offered to the Union. Such payment will carry the same requirements contained in the Respondent's September 1997 offer, including, for example, the requirement that the employees sign a general release before receiving their severance pay. In all the circumstances, I find that this remedy is fair and reasonable. It returns the employees to a position as close to the situation that would have obtained, but for the unfair labor practice, as is possible at this time.[13]

On these findings of fact and conclusions of law, I issue the followed recommended[14]

ORDER

The Respondent, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating against represented employees by offering them lesser benefits because they exercised their right, under Section 7 of the Act, to bargain collectively.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately grant severance pay to the employees represented by the Union in the amount and under the conditions set forth in Respondent's September 1997 offer, plus interest, in the manner set forth in the remedy section of this decision.

(b) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix"[15] to the last known address of each of the employees represented by the Union who is entitled to severance pay under this order. Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be mailed at Respondent's expense.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps Respondent has taken to comply.

Dated, Washington, D.C. October 3, 2000

[13] The severance payments are to include interest from the date of the Respondent's September 1997 offer, in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."